Supreme Court, U.S.
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CLERK

(2)

No. 90-78

In The

Supreme Court of the United States

October Term, 1990

THE ADOBE WESTERN & CASUAL, INC.,

Petitioner,

versus

STATE OF LOUISIANA
(THROUGH THE DEPARTMENT OF REVENUE
AND TAXATION),

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

BRIEF ON BEHALF OF LEON R. TARVER II, SECRETARY DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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A.

QUESTION PRESENTED FOR REVIEW

Should this Court overturn or modify the decision of the Louisiana State Supreme Court in *State of Louisiana through the Department of Revenue and Taxation vs. The Adobe Western & Casual, Inc.*, No. 8-KK-0319, which affirmed the decision of the Louisiana First Circuit Court of Appeals in Suite No. KW-89-2137, in which the First Circuit Court of Appeals held that under the "totality of circumstances analysis", the affidavit in support of the search warrant set forth sufficient information to establish probable cause to believe the crime of willful evasion of sales tax had been, and was being, committed since much of the information provided by the confidential informant was corroborated by Field Auditors?

B.

LIST OF ALL PARTIES

The State of Louisiana through the Department of Revenue and Taxation
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C.

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3. *State v. Paceira*, 390 So.2d 681 (1974)..... 4

4. *State v. Rodriguez*, 476 So.2d 503 (1985).....7

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CONSTITUTION AND LOUISIANA TAX LAWS

1. La. Constitution 1974 Article 1 Section 5..... *

2. R.S. 47:1641 et seq.....*

3. Code of Criminal Procedure Article 167.....3

E.

STATEMENT OF THE CASE

In March, 1989, the Criminal Investigation Section of the Louisiana Department of Revenue and Taxation (hereinafter "the Department") was contacted by a confidential informant regarding information on Adobe Western and Casual, Inc. (hereinafter "Adobe") with reference to underreporting taxable receipts. Agent, Diane Pfeifer, was assigned to the case and thereafter, contacted the confidential informant. Agent Pfeifer interviewed the informant and obtained information regarding the business practices of Adobe. The information obtained by Agent Pfeifer from the interview specifically indicated with particularity that Adobe was in fact intentionally underreporting its taxable receipts and under paying sales tax imposed by the State Tax Laws of Louisiana.

The informant specifically indicated with particularity in the interview that the underreporting and under paying of sales tax liability could be verified by cash register tapes and sales invoices stored at one of Adobe's business locations and, indicated that personal knowledge was attained regarding the storage of those documents at a particular business location.

Following the interview, Agent Pfeifer consulted with appropriate personnel at the Department and, as a result of that, the Department's Field Audit Division conducted an audit examination of the books and records of Adobe's business. An audit was conducted by the Field Audit Division for the years, 1986 through May, 1989, and June, 1989. After conducting this audit examination for approximately sixty (60) days, the auditors found: (1) that

the sales invoices showed with consistency that the invoices contain higher amounts than reported as gross sales on the tax returns, (2) approximately eight percent (8%) of the invoices were missing, (which is an indication that even high amounts of additional sales tax liability exist), (3) by comparing the bank statements to the sales tax returns and deposit receipts, over $100,000 in gross receipts from discover charge cover sales had not been reported on the sales tax returns, and (4) the auditors saw boxes of accounting records in storage at the defendant's business premises as indicated by the informant.

Although the audit examination had been conducted by civil auditors, it was necessary to pursue this matter further in a criminal posture. Therefore, Agent Pfeifer then prepared an affidavit (Exhibit No. 1) and obtained a search warrant (Exhibit No. 2) on August 31, 1989. The warrant was executed on September 5, 1989 at which time numerous business records of Adobe were seized and taken into custody by the Department. These documents were held by the Department and examined thereafter, and were in the process of examination until Adobe filed a Motion to Release and Return the Seized Property. This motion was filed on September 12, 1989 in the 19th Judicial District Court. This motion was set for hearing on October 3, 1989, before the Honorable Frank J. Saia, Judge, 19th Judicial District Court. A hearing was held on that date and, after allowing fifteen (15) days for the filing of post hearing memoranda, on October 18, 1989, the court ruled that the seizure of business records of Adobe was illegal because the information stated in the affidavit did not sufficiently establish the credibility and reliability of the confidential informant, the affidavit did

not sufficiently set forth information stating whether or not criminal activity was going on at the place of business, and that the terms of the Louisiana Code of Criminal Procedure Article 167 were violated because the items seized were not brought before the court so that the court could determine the disposition of these items. (See Trial Court Judgment to Release and Return Seized Property Exhibit No. 3). Thereafter, the Department of Revenue applied for writ to the First Circuit Court of Appeal, said application being granted on the 19th day of January, 1990, which was made peremptory, vacating the trial court's ruling on behalf of the appellant (See Exhibit No. 4). The First Circuit Court of Appeal held:

> "Under the 'totality of circumstances analysis', the affidavit in support of the search warrant sets forth sufficient information to establish probable cause to believe the crime of willful evasion of sales tax had been, and was being committed. Additionally much of the information provided by the confidential informant was corroborated by field auditors."

Subsequent to that decree, the petitioner perfected an application for Writ of Certiorari and/or Review, under docket number 90-KK-0319 to the Supreme Court of Louisiana. That application was denied, 5-1 vote, on March 30, 1990. (Exhibit No. 5)

It is from that ruling that the petition for Writ of Certiorari to the Supreme Court of the United States of America, in conformity with Rule 21 of the Court's rules, that an application was made by Adobe. (Exhibit No. 6).

F.

REASONS FOR DENYING THE WRIT

The Department submits that the information obtained from the personal word of a reliable confidential informant, and the review of records by the Department's civil auditors was sufficient to establish probable cause to issue the warrant herein. In the instant case, the Department obtained information from a reliable confidential informant and had civil auditors examine the books and records of Adobe. After review of the records, the information from the auditors sufficiently corroborated the word of the confidential informant establishing that criminal activity was afoot, and therefore, a search warrant and a seizure pursuant to that warrant would produce evidence tendering to show the commission of an offense. In *State vs. Paceria,* 290 So.2d 681 (1974), the Supreme Court held that a valid search warrant was issued where information was obtained from a reliable confidential informant. Although the informant's information alone was not sufficient to establish probable cause, two police officers had placed the defendant under surveillance for seven hours prior to requesting the warrant that corroborated the information from the informant. The First Circuit Court of Appeal was correct in its application and understanding of the "totality of circumstances analysis", and properly applied basic legal principles mandated to be considered in such application. The "totality of circumstances analysis" of *Illinois vs. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L. Ed. 527 (1983) replaced the "two prong" test of *Aguilar vs. Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L.

Ed.2d 723 (1964) in determining whether information from a confidential informant established probable cause.

Adobe contends that the affidavit submitted for the warrant was insufficient for a magistrate's finding of probable cause. The argument focuses on the alleged lack of information as to the reliability of the informant, and the claimed insufficiency of the details about the criminal activity. It certainly can be argued that the reliability information in the affidavit is more conclusory than specific. But, the courts are no longer dealing with the two prong test of *Aguilar,* supra, rather we must now look at the totality of circumstances. The reliability of the informant's information was enhanced by the specificity and details the Field Audit Section acquired in its audit of Adobe. The auditor's review showed lack of consistency in reporting sales invoices, in addition to, a percentage of certain missing invoices coupled with the reconciliation of certain bank statements which did not, and were not reported on sales tax returns. This information was not conclusory, nor was it, as is sometimes the case, based on hearsay. A review of the affidavit convinced the trial judge that he had a substantial basis for concluding that probable cause existed. See *U.S. vs. Caggino,* 899 Fed.2d 99 (1990).

With respect to Adobe's argument that the search warrant's clause is over broad and insufficiently specific, the courts have held that a search warrant should keep with general requirements and should be interpreted practically, not hypertechnically. *See U.S. vs. Shield's Rubber Co.,* 732 Fed. Supp. 569 (1989). The warrant in this particular case permits the seizure of general ledgers, sales ticket invoices, cash register tapes, sales journals

copies, sales ticket invoice registers, accounts receivable records, all major credit card records, gift certificate sales records, accounts payable records, and any and all other records, notes and papers relating to the business of Adobe. No serious argument can be made that the items in the aforementioned categories are not described with sufficient particularity to allow an officer executing a search to decide with certainty whether an item was or was not to be seized. More importantly, the last general clause which allows any and all other records, notes and papers relating to the business to be seized does not in itself invalidate an otherwise proper search warrant. *U.S. vs. Shield's Rubber Co. Corp.*, supra.

Probable cause to search exists when the facts and circumstances are sufficient to support a reasonable belief that an offense has been committed and that the evidence of contraband may be found at the place to be searched. *U.S. vs. Nocella*, 849 F.2d 33 (1988). In this particular case, in addition to the confidential informant's information, the Department conducted an audit which at the very least verified to a very large degree the informant's tips and should be considered and was in fact considered by the trial judge in issuing the search warrant. Further, probable cause is a fluid concept, and its determination cannot be based on hard certainties and rigid rules. *Illinois vs. Gates*, supra. That court held:

> "In its place we reaffirm the totality-of-circumstances analysis that traditionally has informed probable cause determinations. The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity and the basis of

> knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to insure the magistrate had a substantial basis for concluding that probable cause existed."

The First Circuit Court of Appeals and the Supreme Court of the State of Louisiana both agreed that the magistrate had a "substantial basis" for concluding that probable cause existed, which is contrary to the District Court which clearly misapplied the law, and departed from a long line of jurisprudence in Louisiana. The courts in the State of Louisiana, specifically *State vs. Rodriguez*, 476 So.2d 503 (1985) hold that:

> "The task of the reviewing court in evaluating the search warrant affidavit is simply to insure that the Judge had a substantial basis for concluding that probable cause existed"

Obviously, the reviewing courts must give great deference to a magistrate's determination of probable cause. From the record, it appears that the trial court did not sufficiently respect such a determination. In the case of *State vs. Tallie*, 337 So.2d 504 (1976), the Court awarded such deference to a magistrate's determination. The Department submits that the information in the affidavit is correct and that the burden of proving that the representation of the affidavit by affiant is false is on Adobe.

The information provided by the confidential informant in connection with the review by the Department of the taxpayer's records by the civil auditors indicated that over a period of time, Adobe willfully and intentionally violated a known legal duty.

Although some findings of discrepancies and figures do not automatically, especially in a tax setting attribute penal conduct, systematic consistent deviation in reporting certain liabilities over an extended period of time for such large amounts of money compels the Department to assign some criminal conduct to such gross misrepresentations. In tax prosecution, it is absolutely necessary to have business documents and records in order to prove the commission of any type of offense. Without such records, no case can possibly be made. Thus, the State's request for a search warrant to seize the records of Adobe was absolutely necessary to prove the commission of an offense.

CONCLUSION

The trial court erred in holding that the warrant failed to state that the Department should have possession of the documents seized under the discretion of the court, that the warrant is substantially general, and that the Department should be ordered to return the records to the taxpayer. The Department has in fact returned the records pursuant to the order of the District Court. It is apparent that the taxpayer is pursuing this matter in order to regain information that the Department received as a result of that particular seizure. Even if this Honorable Court would determine that the seizure was incorrect, which the Department vigorously denies, the Department still had the authority to conduct a civil audit which it determined that certain monies are owed. At that particular point, the Department had a right to assess any penalties in its determination regarding that particular

audit and investigation. Because of the peculiar circumstances in this case, the Department determined that it would be in the best interest to go forward with a search warrant which was signed by a Judge. The Department did not abridge nor violate any constitutional right that Adobe had. Because of this, it is submitted that the 1st Circuit Court of Appeals and the Supreme Court are correct in determining that the Department did not violate any constitutional rights and this writ application should be denied.

Respectfully submitted:

/s/ Marlon V. Harrison
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APPENDIX

Exhibit NUMBER

a. Affidavit..... App. 1

b. Search Warrant..... App. 4

c. Trial Court Judgment to Release and Return Seized Property..... App. 6

d. Decision of Louisiana 1st Circuit Court of Appeals..... App. 8

e. Motion for Writ of Certiorari to United States Supreme Court..... App. 10

f. Writ Applicator to State Supreme Court, writ denied..... App. 12

EXHIBIT A

AFFIDAVIT IN APPLICATION
FOR SEARCH WARRANT

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally appeared Special Agent Diane Pfeifer of the Louisiana Department of Revenue and Taxation, Criminal Investigation Division, who, being first duly sworn, deposed and said that she has good reason to believe that located on/in the premises described as follows:

The Adobe Western and Casual, Inc.
12393 Florida Boulevard
Baton Rouge, Louisiana 70815

there is now located the following property which is evidence of the commission of an offense against the laws of the State of Louisiana:

Banking records; general ledgers; sales tickets/invoices/cash register tapes; sales journals; cash receipts journals; sales ticket/invoice registers; accounts receivable records; Mastercard, Visa, American Express and Discover charge card records; gift certificate sales records; accounts payable records; electronic data storage devices; computer records and printouts; any and all other records, notes and papers relating to the business of The Adobe Western and Casual, Inc.

PROBABLE CAUSE IS BASED UPON THE FOLLOWING:

Affiant has been informed by a reliable, confidential informant that this business intentionally underreports

its taxable receipts and underpays its sales tax liability, which is a violation of the Tax Laws of the State of Louisiana as set forth under Title 47 of the Louisiana Revised Statutes. Informant states that this allegation can be verified by cash register tapes and sales invoices stored at The Adobe Western and Casual, Inc., 12393 Florida Boulevard, Baton Rouge, Louisiana 70815. Informant has witnessed the storage of cash register tapes and sales invoices at this address.

Civil auditors of the Louisiana Department of Revenue and Taxation are currently auditing The Adobe Western and Casual, Inc. The representative assigned by the corporation to work with the auditors has provided sales invoices. For the two months thus far examined, sales invoices provided are higher than amounts reported on the sales tax returns. The auditors further determined that approximately either percent (8%) of invoices are missing, an indication that even higher amounts of additional sales tax liability exist. By comparing bank statements to sales tax returns and deposit receipts, auditors discovered over $100,000.00 in gross receipts from Discover charge card sales which were not reported on the sales tax returns. The corporate representative claims that cash register tapes cannot be located. Auditors have seen boxes of accounting records in storage at The Adobe Western and Casual, Inc., 12393 Florida Boulevard, Baton Rouge, Louisiana 70815, and are currently examining those records which are made available at that location.

The undersigned officer requests a warrant to search the aforesaid business (including all structures, desks, file cabinets, safes, vehicles, and other places of concealment

on the premises where the things specified may be found located thereon) for the things specified in this affidavit.

/s/ Diane Pfeifer
AFFIANT

SWORN TO AND SUBSCRIBED before me this 31st day of August, 1989.

/s/ Diane Pfeifer
JUDGE, 19TH JUDICIAL
DISTRICT COURT

EXHIBIT B

SEARCH WARRANT

STATE OF LOUISIANA
EAST BATON ROUGE PARISH

To any peace officer in and for the Parish of East Baton Rouge:

An affidavit has been made before me upon the oath of Special Agent Diane Pfeifer of the Louisiana Department of Revenue and Taxation, alleging that the business located at 12393 Florida Boulevard, Baton Rouge, Louisiana 70815, is a place where:

> Banking records; general ledgers; sales tickets/ invoices; cash register tapes; sales journals; sales ticket/invoice registers; accounts receivable records; Mastercard, Visa, American Express and Discover charge card records; gift certificate sales records; accounts payable records; electronic data storage devices; computer records and printouts; any and all other records, notes and papers relating to the business of The Adobe Western and Casual, Inc.

are located, and affidavit submitted in support of this search warrant shows the necessary probable cause for its issuance. The purpose and reason for the search is to find and seize the items listed above.

YOU ARE HEREBY ORDERED to search the aforesaid business (Including all structures, desks, file cabinets, safes, vehicles, and other places of concealment on the premises where the things specified may be found) and if the things specified are found there, to seize them and hold them in safe custody pending further orders of the

court. This shall be your warrant, whereof you are to make due return according to law.

WITNESS my official signature on this 31st day of August, 1989 at 2:05 o'clock P.M.

/s/ Fred Pitcher
JUDGE, 19TH JUDICIAL
DISTRICT COURT
STATE OF LOUISIANA
EAST BATON ROUGE PARISH

EXHIBIT C

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

STATE OF LOUISIANA (THROUGH THE DEPARTMENT OF REVENUE AND TAXATION)

VERSUS

THE ADOBE WESTERN & CASUAL, INC.

NUMBER: 9-89-327

SECTION: III

JUDGMENT ON MOTION TO RELEASE AND RETURN SEIZED PROPERTY

This matter came before the Court for hearing on October 3, 1989, pursuant to a Motion to Release and Return Seized Property filed on behalf of the defendant. The Adobe Western & Casual, Inc., on September 12, 1989.

Present: The Adobe Western & Casual, Inc., the defendant, through counsel of record; and,

The State of Louisiana through the Department of Revenue and Taxation through its attorney of record.

Considering the law, testimony, evidence, arguments of counsel, the court record, and for reasons orally assigned, the Court found that the records, documents and all other items or property seized by the State of Louisiana as a result of the execution of a search warrant dated August 31, 1989, and executed on September 5,

1989, were seized unlawfully and in violation of Article 1, §5, of the Constitution of the State of Louisiana; the Fourth Amendment to the Constitution of the United States, and further that custody of such seized property by the Department of Revenue and Taxation is in violation of Article 167(C) of the Code of Criminal Procedure of Louisiana. Further, that said search was unlawful and violative of Article 1, §5 of the Louisiana Constitution and the Fourth Amendment to the Constitution of the United States.

For these reasons, the motion of the defendant should be granted.

IT IS ORDERED, ADJUDGED AND DECREED that the motion filed in the above numbered and captioned matter by the defendant to release and return to it the illegally seized property is hereby granted.

Judgment rendered October 18, 1989.

Judgment signed on the 19th day of October, 1989.

/s/ Frank J. Saia
JUDGE, 19TH JUDICIAL
DISTRICT COURT

EXHIBIT D

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA (THROUGH THE DEPARTMENT OF REVENUE AND TAXATION)	NO. KW 89 2137
VERSUS	
THE ADOBE WESTERN AND CASUAL, INC.	JANUARY 19, 1990

In re: State of Louisiana applying for supervisory writs, 19th Judicial District Court, Parish of East Baton Rouge, No. 9-89-327.

JANUARY 19, 1990

WRIT GRANTED AND MADE PEREMPTORY:

Under the totality of the circumstances analysis, the affidavit in support of the search warrant sets forth sufficient information to establish probable cause to believe the crime of willful evasion of sales tax had been, and was being, committed. Additionally, much of the information provided by the confidential informant was corroborated by field auditors.

The trial court's ruling is hereby vacated, and the matter remanded for the purpose of a hearing to

determine the disposition of the seized property under La. C.Cr.P. art. 167.

MAL
HJC
FF

JANUARY 19, 1990

COURT OF APPEAL, FIRST CIRCUIT

/s/ Stanley P. Lemoine
CLERK OF COURT
FOR THE COURT

EXHIBIT E

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA
(THROUGH THE DEPARTMENT OF
REVENUE AND TAXATION) NO. 90-KK-0319

VS.

THE ADOBE WESTERN AND
CASUAL, INC.

IN RE: Adobe Western and Casual Inc.; – Defendant(s); Applying for Writ of Certiorari and/or Review, Supervisory and/or Remedial Writs; to the Court of Appeal, First Circuit, Number KW89 2137; Parish of East Baton Rouge 19th Judicial District Court Div. "F" Number 9-89-327

March 30, 1990

Denied.

HTL

WFM

JLD

JCW

LFC

CALOGERO, J., would grant the writ.

Supreme Court of Louisiana
March 30, 1990

/s/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

EXHIBIT F

SUPREME COURT OF LOUISIANA

NO. 90-KK-0319

STATE OF LOUISIANA
(THROUGH THE DEPARTMENT OF REVENUE)

VERSUS

THE ADOBE WESTERN & CASUAL, INC.

NOTICE OF PETITION

FOR WRIT OF

CERTIORARI TO THE
UNITED STATES SUPREME COURT

APPEAL COUNSEL:

/s/ J. David Bourland
J. DAVID BOURLAND
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11017 Perkins Road, Suite C
Baton Rouge, Louisiana 70810
Telephone: 504-767-0312

Attorney for Defendant/
Appellant
The Adobe Western & Casual, Inc.

NOTICE

NOW INTO COURT, comes defendant/appellant, The Adobe Western & Casual, Inc., by and through undersigned counsel, and pursuant to Rules 10; 11; 15; and, 21 of the Rules of The Supreme Court of The United States, notice is hereby given of application for certiorari of this matter to the Supreme Court of the United States.

Writ of Certiorari and/or Review, Supervisory and/or Remedial Writs, were denied on the 30th day of March, 1990, by this honorable court. This matter was on appeal to it from the First Circuit Court of Appeal of Louisiana, under number KW89-2137, and on appeal from the 19th Judicial District Court, Division "F", under 9-89-327, as set forth in the attached decision of the before stated date.

Respectfully submitted,

/s/ J. David Bourland
J. DAVID BOURLAND
Attorney at Law
Bar Roll Number: 3327
11017 Perkins Road, Suite C
Baton Rouge, Louisiana 70810
Telephone: 504-767-0312

Attorney for Defendant/
Appellant
The Adobe Western & Casual,
Inc.

CERTIFICATE

I hereby certify that a copy of the foregoing has this date been mailed, postage prepaid to:

Mr. Douglas Herbert, counsel of record,
Attorney at Law
Department of Revenue and Taxation
P.O. Box 4064
Baton Rouge, LA 70821-4064

Honorable Frank J. Saia
Judge, 19th Judicial District Court
6th Floor, Governmental Building
222 St. Louis Street
Baton Rouge, LA 70802

Honorable Stanley Lemoine
Clerk, First Circuit Court of Appeal
Room 902, Governmental Building
222 St. Louis Street
P.O. Box 4408
Baton Rouge, LA 70821-4408.

BATON ROUGE, LOUISIANA, this 1 day of May, 1990

/s/ J. David Bourland
J. David Bourland